APPEAL NO. 93105

Pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN., art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act), a contested case hearing was held on January 11, 1993, in (city), Texas, (hearing officer) presiding as hearing officer. She accepted the report of the designated doctor as to maximum medical improvement (MMI) and whole body impairment rating of eight percent and awarded benefits accordingly. She further found that due to the effects of his compensable injury, the appellant (claimant) continues to be unable to obtain and retain employment at wages equivalent to the wage he was earning prior to (date of injury). Claimant asks that the decision be reversed, urging that he has not yet reached MMI and, alternatively, if MMI has been reached, that the case be remanded for a second hearing to determine an impairment rating between 15 percent and 40 percent. Respondent (carrier) urges that the decision be affirmed.

DECISION

Finding there is sufficient evidence to support the determinations of the hearing officer, the decision is affirmed.

The issues announced and agreed to by the parties at the inception of the contested case hearing were: (1) whether the claimant has reached MMI; (2) if so, what is his current impairment rating; (3) and, if he has not reached MMI, whether he continues to have disability which would entitle him to temporary income benefits (TIBS). The evidence consisted of the testimony of the claimant, the claims manager for the carrier, and medical reports from various doctors. The claimant, an iron worker, who had been working for the employer for less than a week, injured his back on (date of injury) while bending over tightening a bolt. He sought medical treatment from a physician the next day and was prescribed medication and released to return to light duty. He subsequently worked approximately two weeks and, pursuant to suggestions from some coworkers, went to see a chiropractor, (Dr. B), who told the claimant to stay off work completely. He is still under the treatment of Dr. B. Dr. B referred claimant to a (Dr. D), a Lake Charles, Louisiana, orthopedic surgeon, who instructed him to engage in sedentary work only. Claimant last saw Dr. D in December 1992. X-rays were taken by Dr. D and an MRI was subsequently performed by a (Dr. T) which claimant testified showed disc herniation/protrusion at L3-4 and L4-5. Pursuant to carrier's request, the claimant was seen by a (Dr. R), a neurosurgeon. Since there was a dispute as to MMI and impairment rating, a designated doctor, (Dr. H), a general practice physician, was appointed by the Commission.

The claimant testified that he could not currently do work as an iron worker and that he was still receiving treatment from Dr. B. Further, he thought he was improving to some degree. He also testified that his current complaints are that he has "low back and neck pain sometimes" but not all the time, and that "I'm in pretty good shape right now" and "I've got a little pain in my low back but not much." He indicated that he went to the Texas Rehabilitation Commission but that they never said anything definite as to what they were going to do. He stated he never did follow up with them because his wife was sick and not

because he did not think he could find another job. He also stated that Dr. H did not give him a thorough examination and "only examined him real quick."

A medical report and Texas Workers' Compensation Commission Form 69 (Report of Medical Evaluation) (TWCC-69) from Dr. D notes disc herniation at L4-5 and disc protrusion at L3-4, determines MMI on "6/30/92" and assesses a total body impairment rating of 40 percent. There is no indication one way or the other how the rating was broken down or reached or what guidelines, if any, were used. Medical reports submitted by Dr. R indicate his opinion that "MRI Scan shows only questionable abnormality at L4-5," that claimant has a lumbar sacral strain and that a work hardening program would be the "best means of returning (the claimant) to useful activity." He indicates in a report dated July 31, 1992 that he thinks "a date of maximum medical improvement in the absence of a work hardening program of 06/30/92 is reasonable" and that "[i]t is generally considered appropriate to give a patient an over-all partial disability rating of fifteen percent following lumbar disc herniations whether they are surgically treated or untreated." Dr. R goes on to state that "[d]espite the fact that we have no hard clinical evidence that this gentleman has a disc herniation, he does have some radiographic abnormalities and I think it is not unreasonable to give him a partial disability rating of fifteen percent as of 06/30/92." Dr. H, the designated doctor, submitted a TWCC-69 which found an MMI date of "6-30-92" with an eight percent impairment rating. Initially he used the wrong AMA Guides (Guides to the Evaluation of Permanent Impairment, Third Edition, American Medical Association) in performing his evaluation but subsequently reevaluated the claimant's impairment rating using the correct version. He states in the report:

> [Claimant's] MRI reveals minimal disc prostusion (sic) between L 45 and L 34. The intervetrabal foramina, nerve roots and perineural fat, are normal with no nerve root encroachment. Physical exam reveals no neuro deficits. The patient has subjective complaints of pain with range of motion. The range of motion is limited due to pain and not due to a structural limitation.

As indicated above, the hearing officer accepted the MMI determination and impairment rating of the designated doctor and found that it "had not been overcome by the great weight of contrary medical evidence." Though also finding the claimant has disability, the hearing officer correctly observes in her Decision and Order that "claimant's disability is irrelevant if he has reached maximum medical improvement." This is because any entitlement to temporary income benefits (TIBS) based upon disability ceases upon the reaching of MMI. Article 8308-4.23(a) and (b). Other than the claimant's treating doctor, Dr. B, virtually all of the other medical evidence seems to support the finding that claimant reached MMI on June 30, 1992 as determined by the designated doctor. Clearly, there is sufficient evidence to support the finding and conclusion of the hearing officer on this issue.

Regarding the issue of impairment rating, the 1989 Act provides that if there is a

dispute and the parties are unable to agree on a designated doctor, the Commission will select a designated doctor to examine the claimant. In such case, "the report of the designated doctor shall have presumptive weight and the Commission shall base the impairment rating on that report unless the great weight of the other medical evidence is to the contrary. . . ." Article 8308-4.26(g). We have repeatedly emphasized the unique position occupied by the designated doctor under the 1989 Act. *See* Texas Workers' Compensation Commission Appeal No. 92555, decided December 2, 1992; Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. It is not unusual to have disagreement or some degree of disparity between the reports of various doctors who have treated or examined an injured worker. *See generally*, Texas Workers' Compensation Commission Appeal No. 92522, decided November 9, 1992; Texas Workers' Compensation Commission Appeal No. 92561, decided December 4, 1992. As we observed in Appeal 92412, *supra*, this was something the legislature must have envisaged in enacting Articles 8308-4.25 and 4.26, which provide a mechanism, namely the designated doctor, when there is a dispute involving MMI or impairment rating. In appeal 92412, we went on to point out that to outweigh the report of a designated doctor requires more than a mere balancing of the medical evidence or a preponderance of medical evidence; rather, such other medical evidence must be determined to be the "great weight" of the medical evidence contrary to the report. In Texas Workers' Compensation Commission Appeal No. 93062, decided March 1, 1993, we noted that the 1989 Act does not require a particular degree of specialty on the part of a designated doctor, even though other specialists may have evaluated the injured worker, and that the findings of a general practitioner selected as the designated doctor were appropriately accorded presumptive weight. We did observe, however, that, under a particular set of circumstances it might be appropriate to consider the appointment of a designated doctor with a particular specialty.

In this case it is apparent that there was disagreement between the various doctors not only on an impairment rating, but also on the degree of injury and the results of objective tests. And, there is no indication of the basis or guidelines, if any, used by either Dr. D, to whom the claimant was referred by his treating doctor, Dr. B, or by Dr. R, the carrier selected doctor. According to his report, Dr. R's determination seems to be based more on a notion or on usual practice. There is no indication as to Dr. D's methodology and it is not readily apparent how he arrived at his impairment rating. It does not have any indicia of complying with the requirements of the Texas Workers' Compensation Act. On the other hand, the evidence of record establishes that Dr. H's rating complied with the requirements of the 1989 Act. This situation is distinguishable from our holding in Texas Workers' Compensation Commission Appeal No. 92561, decided December 4, 1992. In that case, we reversed and remanded where there was a significant disparity in the impairment ratings of two specialists in the same discipline who were both using the same objective guidelines. Finding no explanation or rationale, under the circumstances, for the significant disparity, we remanded for further consideration and development of evidence, stating that "we by no means hold it necessary that differences in impairment ratings be explained any time there is some

disparity" and that under the particular circumstances found in that case, we thought it appropriate and helpful to have the matter developed in the evidence. We emphasize again that it is essential that the Commission have a designated doctor program that is credible, fair, and widely accepted as retaining as designated doctors only well qualified individuals who are in good standing in their profession, who are totally impartial, and who have some understanding of the program. Appeal No. 93062, *supra*.

We find that there is sufficient evidence to support the hearing officer's determination which accorded presumptive weight to the designated doctor's report and found that the great weight of the other medical evidence was not contrary thereto. The decision is affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge